

## BUREAU OF LAW

## MEMORANDUM

TO: State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: The Matter of the Application of  
Emmanuel L. de Lyra for Refund of  
Mortgage Recording Taxes

A hearing on the above entitled application was held before me on September 8, 1968 at 80 Centre Street, New York, New York. Appearances and exhibits introduced were as noted on the stenographic transcript.

The issues involved (1) whether a paper recorded in the office of the Register of the City of New York, New York County, on October 30, 1967 is a mortgage, and (2) if such paper is a mortgage, whether it is exempt from recording taxes as a supplemental mortgage.

On October 30, 1967 the taxpayer offered for recording in the Register's office in New York County a paper dated May 11, 1956, described as an "agreement" (Ex. 5), hereinafter referred to as the Tufaro agreement, and a paper described as an "assignment" (Ex. 14), between himself and one Frank J. Tufaro. The recording officer demanded a recording tax of \$175 which was paid under protest. No statement under oath, claiming exemption from the tax, was submitted or filed. Under the agreement and assignment Tufaro bound himself to lend to de Lyra sums not exceeding \$35,000; de Lyra was bound to pay interest at 6%; and as collateral security de Lyra assigned to Tufaro all of his (de Lyra's) right, title and interest in a certain agreement dated November 6, 1947, hereinafter referred to as the Anasae agreement, relating to a parcel of real property at 78-80 Wall Street, New York City, record title of which was held in the name of Anasae Corporation.

The Anasae agreement (Ex. 4), executed by the taxpayer, Jane L. de Lyra, Joseph L. de Lyra, Vincent de Lyra and Anasae Corporation, purported, among other things, to declare that although title to the real property at 78-80 Wall Street, New York City was held in the name of Anasae Corporation, the actual interests of the parties was to be considered to be as co-adventurers, to the extent of the percentages set forth in the agreement; that Emmanuel de Lyra's interest was 30%; and that Emmanuel de Lyra was to receive 10% of the net profit derived from the future sale of the property in consideration for services rendered by him "in behalf of the joint venture." This agreement was recorded in the Register's office on January 28, 1966.

Taxpayer contends that the Tufaro agreement and assignment (Ex. 5, 14) were additional collateral security for an existing obligation in the sum of \$35,000, previously secured by a mortgage, hereinafter referred to as the Virvin mortgage, dated May 11, 1956 (Ex. 1), which was acknowledged on May 4, 1957 and recorded in the Kings County Register's office on May 4, 1957, covering real property at 118 Penimore Street, Brooklyn, New York. This mortgage, in the face amount of \$35,000, was executed by Frank J. Tufaro, as president of Virvin Corporation, the mortgagor, and names Frank J. Tufaro and Virginia Tufaro as mortgagees.

Taxpayer alleged that he owned 100% of the stock of Virvin and that he "was the corporation" (Trans. p. 16); that additional sums were advanced under the Tufaro agreement dated May 11, 1956 (Ex. 5) to the extent of between \$18,000 and \$20,000 (Trans. pp. 21, 32); and that the additional security was demanded by Tufaro because the security of the mortgage had become impaired by a decline in the value of the Brooklyn real property (Trans. p. 34).

In order to determine whether the Tufaro agreement recorded October 30, 1967 (Ex. 5) was properly taxed as a mortgage, it is necessary to ascertain (1) whether such paper as recorded imposes a lien on or affects the title to real property, as a mortgage is defined in section 250 of Article 11 of the Tax Law, and (2) if it is a mortgage, whether such mortgage is a supplemental one within the meaning of section 255 of Article 11 of the Tax Law.

The Tufaro agreement purported to create a security interest in favor of Tufaro of the taxpayer's interest under the Anasae agreement, in the Wall Street property. The Anasae agreement created interests in favor of the taxpayer consisting of (1) fee interest of 30%, (2) unliquidated interest of 10% of the net profits to be derived from a future sale of the premises, and (3) an option to rent 30% of the floor area of the building at \$1.50 per square foot.

Whether it be considered a deed, or mortgage or both, for the purposes of this proceeding, the Anasae agreement dated November 6, 1947 was a recorded lien as far as the realty was concerned. Taxpayer testified (Trans. pp. 35-40) that such paper was recorded to protect his interests; that such recording created an encumbrance on the real property; and that Anasae was thereby prevented from conveying the realty without taxpayer's consent. See, also, taxpayer's contentions in his letters (Ex. 2, 6, 9), where he considers the Anasae agreement a lien.

It appears that at the time of recording the Anasae agreement mortgage recording taxes might have been imposed in an amount to be determined under section 256 of Article 11 of the Tax Law, relating

to mortgages for indefinite amounts or contract obligations. While the precise issue of imposition of such tax on the Anasae agreement is not before the Commission on this proceeding, the nature of the paper, as a conveyance, is. The Anasae agreement encumbers the realty and contains elements both of a deed and a mortgage. Taxpayer's interests in the real property at 78-80 Wall Street created thereby were assigned, as security for indebtedness, under the Tufaro agreement. I am, therefore, of the opinion that the Anasae agreement, whether a deed or a mortgage, is a conveyance; and that the Tufaro agreement, imposing a lien affecting the title to real property, as security for an indebtedness, is a mortgage within the definition contained in section 250 of Article 11 of the Tax Law.

The question of whether the Tufaro agreement is exempt from recording taxes as a supplemental mortgage requires consideration of section 255 of Article 11 of the Tax Law, which, in substance, provides that where a tax has been paid on recording of an instrument which imposes a lien on real property as security for indebtedness, any supplemental instrument which constitutes additional security for the same indebtedness is exempt from mortgage recording taxes, provided a statement under oath of the facts on which the exemption is claimed shall be filed with the recording officer at the same time as the recording of the supplemental mortgage. The taxpayer contends that the Tufaro agreement is additional security for the pre-existing indebtedness secured by the Virvin mortgage (Ex. 1), and testified (Trans. pp. 11,34) that Tufaro had lent him, in the corporate name of Virvin, \$35,000 and taken back a mortgage on the Brooklyn property; that "as time went by" Tufaro became insecure and requested additional collateral; that the taxpayer then executed the Tufaro agreement. Inasmuch as the Virvin mortgage and the Tufaro agreement were both executed on the same day, May 11, 1956, by the different parties, and neither refers to the other, and considering that the Virvin mortgage presumably secures an indebtedness incurred concurrently with its execution while the Tufaro agreement contemplates future advances, it is my opinion that the Tufaro agreement is not a supplemental mortgage given as additional security for the indebtedness secured by the Virvin mortgage within the meaning of section 255 of Article 11 of the Tax Law.

I am of the further opinion that even if the Tufaro agreement was intended to be supplemental to the Virvin mortgage, no exemption from mortgage recording taxes may be allowed, as no statement under oath, on which the claim for exemption was based, was filed at the time of recording, as required by section 255 of Article 11 of the Tax Law. In fact, the Tufaro agreement makes no reference to the Virvin mortgage at all, nor to the indebtedness secured thereby.

A mortgage may not qualify for exemption unless the indebtedness secured thereby is the same indebtedness secured by a prior existing recorded mortgage. While the identity of the parties may be different (such differences must be explained), and the instrument may impose a lien on other or additional property, and changes in terms and conditions may be effected, nevertheless, as long as no new indebtedness is created, the mortgage is supplemental, Suffolk County Federal Savings and Loan Association v. Bragalini, 5 NY 2d 579; Matter of Park and 46th Street Corporation v. State Tax Commission, 295 N. Y. 173; People ex rel. Banner Land Company v. State Tax Commission, 244 N. Y. 159; Brodsky v. Murphy, 26 AD 2d 225, aff'd. 20 NY 2d 828; Matter of Fifth Avenue Corporation v. Bragalini, 4 AD 2d 387. There is no evidence here, however, that the indebtedness under the Tufaro agreement is the same indebtedness secured by the Virvin mortgage.

As no mortgage recording taxes were paid at the time of recording of the Anasae agreement, which created, among other things, fee and leasehold interests in the taxpayer, which he encumbered by the Tufaro agreement, as well as a lien to secure payment for his services, it is unnecessary to consider whether the Tufaro agreement was supplemental to the Anasae agreement, or whether the Anasae agreement is, in fact, a mortgage.

The attention of the Tax Commission is directed to the fact, as previously noted, that the Anasae agreement might, possibly, have been subject to mortgage recording taxes pursuant to section 256 of Article 11 of the Tax Law. It should also be noted that while the Tufaro agreement was held subject to a tax based on principal indebtedness of \$35,000, the taxpayer testified (Trans. pp. 20-21, 39-43) that additional sums were advanced, in excess of the principal indebtedness, on that security. These questions are not, however, involved in this application for refund.

Accordingly, I am of the opinion that the Tufaro agreement, recorded in the office of the Register of the City of New York on October 30, 1967 was a mortgage within the meaning of section 250 of Article 11 of the Tax Law; that such mortgage was not supplemental within the meaning of section 256 of Article 11 of the Tax Law; and that the taxpayer's application for refund should be denied.

The determination of the Tax Commission should be substantially in the form submitted herewith.

/s/

ALFRED RUBINSTEIN  
Hearing Officer

AR:nn  
October 30, 1968

STATE OF NEW YORK  
STATE TAX COMMISSION

-----  
IN THE MATTER OF THE APPLICATION :  
OF :  
EMMANUEL L. de LYRA :  
FOR REFUND OF MORTGAGE RECORDING TAXES :  
IMPOSED UNDER ARTICLE 11 OF THE TAX LAW :  
WITH RESPECT TO REAL PROPERTY SITUATED :  
IN THE CITY OF NEW YORK :  
-----

Emmanuel L. de Lyra having filed an application for refund of mortgage recording taxes imposed under Article 11 of the Tax Law with respect to real property situated in the City of New York, and a hearing having been held before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at 80 Centre Street, New York, New York, on September 8, 1968, at which hearing the taxpayer appeared in person, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Emmanuel L. de Lyra, and Jane L. de Lyra, Joseph L. de Lyra, Vincent de Lyra and Anasae Corporation, a domestic corporation, entered into a written agreement on November 6, 1947 under which, among other provisions, it was declared that the parties were co-adventurers, who had purchased real property at 78-80 Wall Street, in the City and State of New York, taking title in the name of Anasae Corporation; that the interests of the parties in the realty were stated to be 30% in Emmanuel L. de Lyra and the balance in the varying percentages in the other individuals; that as and for consideration for services

rendered and to be rendered to the joint venture, 10% of the profits to be realized on any future sale of the realty were to be paid to Emmanuel L. de Lyra at the time of such sale; that Emmanuel L. de Lyra was granted an option to lease a certain stated portion of the realty for a stated term of years at a stated rental; that on January 28, 1966 the agreement was recorded in the office of the Register of the City of New York, New York County, at L. 13, p. 94, without payment of any recording taxes.

(2) That on May 11, 1956 a mortgage was executed by Virvin Corporation, a domestic corporation, as mortgagor, in favor of Frank J. Tufaro and Virginia Tufaro as mortgagees, covering realty at 118 Fenimore Street, Brooklyn, New York, as security for indebtedness in the sum of \$35,000; that Frank J. Tufaro signed and acknowledged such mortgage as president of Virvin Corporation, the mortgagor; that such mortgage makes no reference to Emmanuel L. de Lyra or the 78-80 Wall Street premises; that such mortgage was recorded in the office of the Register of the City of New York, Kings County, on May 4, 1957 at L. 11356, p. 303, on payment of recording taxes of \$173.

(3) That on May 11, 1956 a paper described as an agreement was executed by Emmanuel L. de Lyra and Frank J. Tufaro, under which Frank J. Tufaro agreed to make loans to Emmanuel L. de Lyra in advances not to exceed \$35,000 in the aggregate, at interest of 6%; that as security for such loans Emmanuel L. de Lyra assigned to Frank J. Tufaro all of his (de Lyra's) right, title and interest in the agreement made with other parties named de Lyra and Anasae Corporation on November 6, 1947 relating to the realty situated at 78-80 Wall Street, New York, New York; that such agreement between Emmanuel L. de Lyra and Frank J. Tufaro contained no reference to

any other indebtedness, or to Virvin Corporation or the mortgage executed by Virvin Corporation on the same day; that on October 30, 1967 Emmanuel L. de Lyra offered the agreement executed by him and Frank J. Tufaro for recording in the office of the Register of the City of New York, New York County; that the City Register at that time demanded recording taxes of \$175 which were paid by the taxpayer under protest, claiming an exemption; that no statement under oath of the facts on which such claim of exemption was based was filed with the recording officer at the time of recording; that the agreement was recorded on October 30, 1967, at L. 236, p. 322.

(4) That the agreement made by the taxpayer and other parties named de Lyra and Anasae Corporation on November 6, 1947 was a conveyance of real property which imposed a lien on or affected the title to real property situated at 78-80 Wall Street, New York, New York; that the agreement made between the taxpayer and Frank J. Tufaro on May 11, 1956 and recorded on October 30, 1967 imposed a lien on or affected the title of taxpayer's interest in the real property situated at 78-80 Wall Street, New York, New York, as security for indebtedness to be incurred; that the mortgage executed May 11, 1956 by Virvin Corporation to Frank J. Tufaro and Virginia Tufaro, recorded on May 4, 1957 was given as security for existing indebtedness owed by Virvin Corporation to Frank J. Tufaro and Virginia Tufaro; that the agreement made by and between taxpayer and Frank J. Tufaro dated May 11, 1956 and the mortgage made by Virvin Corporation to Frank J. Tufaro and Virginia Tufaro dated May 11, 1956 related, respectively, to separate and different indebtedness.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

**DETERMINES:**

(A) That the agreement made by Emmanuel L. de Lyra, Jane L. de Lyra, Joseph L. de Lyra, Vincent de Lyra and Anasae Corporation on November 6, 1947 and recorded in the office of the Register of the City of New York, New York County, on January 28, 1966 was a conveyance of and affected the title to real property, and vested an interest in the real property situated at 78-80 Wall Street, New York, New York, in Emmanuel L. de Lyra (Finding 1).

(B) That the agreement made by Emmanuel L. de Lyra and Frank J. Tufaro on May 11, 1956 and recorded in the office of the Register of the City of New York, New York County, on October 30, 1967 imposed a lien on or affected the title to real property; that such agreement was executed as security for indebtedness (Finding 3); that such agreement was a mortgage as defined in section 250 of the Tax Law.

(C) That the agreement made by Emmanuel L. de Lyra and Frank J. Tufaro on May 11, 1956 and recorded in the office of the Register of the City of New York, New York County, on October 30, 1967 was not additional security for any indebtedness previously secured by a mortgage on which recording taxes were paid; that, furthermore, at the time of recording of such agreement no statement under oath of the facts on which a claim for exemption was based was filed with the recording officer; that such agreement was not a supplemental mortgage within the meaning of section 255 of the Tax Law.



(D) That, accordingly, the determination of the recording officer that mortgage recording taxes were due and payable was correct; and that the application of Emmanuel L. de Lyra for refund of mortgage recording taxes be and the same is hereby denied.

DATED: Albany, New York this 8th day of January , 196<sup>9</sup>8.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY  
**PRESIDENT**

/s/

A. BRUCE MANLEY

**COMMISSIONER**

COMMISSIONER